

**HOUSE BILL 266 - REP. GALEN HOLLENBAUGH  
ELIMINATING POLICE OFFICER CONTRIBUTION WHEN PARTICIPATING  
IN DROP RETIREMENT PROGRAM**

**BACKGROUND:**

In 2001, the legislature enacted a program referred to as the Deferred Retirement Option Program (DROP). Montana Police Officers Retirement System (MPORS) members that are otherwise eligible for retirement can file a one-time irrevocable election to participate in DROP for anywhere from one to five years. Mont. Code Ann. § 19-9-1204.<sup>1</sup>

As Montana's police officers' salaries, particularly at the beginning of their careers, are quite low, police officers were reaching the end of their careers and discovering their retirement funds were completely inadequate. In addition, due to the lower salaries, difficult schedules, and stressful working conditions, retention and recruitment for police officers was and remains difficult. The DROP program was designed to address these issues and give officers a tool to boost their retirement income by increasing saving and to keep experienced officers working in Montana's police departments.

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<sup>1</sup> a. During the period in which the member is participating in DROP:

(1) A participant remains a member of the retirement system, but **may not** receive membership service or service credit in the retirement system. Mont. Code Ann. § 19-9-1204(4).

(2) PERB calculates the amount equal to the monthly benefit that would have been payable to the participant had the participant terminated service and retired, and holds that amount in a DROP account associated with the MPORS member. Mont. Code Ann. § 19-9-1202.

(3) Contributions by the MPORS member, state and employer must continue to be paid to the retirement system at the same level as if the member was receiving service credit in the retirement system. Mont. Code Ann. § 19-9-1205.

b. Upon expiration of the DROP period:

1. The member can continue covered employment with a police department, but PERB considers the member newly hired as of the date the DROP period ended. Mont. Code Ann. § 19-9-1207.

2. The member is immediately vested for benefits accrued prior to the DROP period and can also earn service credit after the DROP period. Mont. Code Ann. § 19-9-1207.

c. Upon termination of service from employment, the member is entitled to receive a distribution of the DROP benefit, plus interest, plus regular retirement benefits to which the officer is entitled. Mont. Code Ann. § 19-9-1208.

During legislative consideration of the DROP program, Public Employees' Retirement Board's (PERB's) actuarial consultant provided Montana Public Employees' Retirement Administration (MPERA) (and ultimately, the legislature) with several analyses of the potential fiscal impact of various facets of the program under consideration. The PERB's consultant determined, based upon numerous prospective assumptions, that the DROP program would not be cost-neutral and would increase the MPORS Actuarial Liability. For this reason, the continuing employee contribution requirements were placed in the program. At that time, Montana Police Protective Association (MPPA) and Montana Association of Chiefs of Police (MACOP) members expressed their disagreement with several of the assumptions made by the PERB's actuarial consultant. On behalf of its members participating in or considering DROP, MPPA retained its own actuary to review the Montana DROP.

Unfortunately, PERB refused to provide MPPA the necessary data to allow an independent actuarial review. As a result, MPPA was forced to go to court and require the PERB to provide the necessary data. MPPA won that legal action and the Court required the PERB to provide MPPA the data. The Court ordered PERB to provide the data on July 10, 2008. MPPA did not receive the data until November of 2008. As a result, MPPA was incredibly hampered in its effort to respond to the PERB fiscal note which cites verbatim the PERB actuarial report and provide this committee with the information it needs to accurately contemplate this bill. However, last week MPPA received a report from its actuary.

#### **THIS PURPOSE OF THIS BILL:**

The Montana Police Protective Association and the Montana Association of Chiefs of Police still believe this program could be an excellent tool to accomplish the goals and objectives behind this program: improve retention and recruitment of police officers. However, the Montana DROP program is the only deferred retirement option program in the nation where the member must continue to make full employee contributions to the system during the DROP period, yet receives absolutely no corresponding benefit – either in terms of allocation of some or all of that contribution to the member's DROP account or in terms of continuing service credits- attributable to that contribution and DROP period. Thus Montana Police Officers contribute 9% of salary, or between \$400 to \$600 per month for absolutely no purpose. This bill does away with employee contributions upon entering the DROP.

As argued by MPPA and MACOP at the time of the passage of the DROP legislation, it is MPPA and MACOP's position which is now supported by its actuary, that this does not result in an actuarial liability to the system. In fact, this program, if more fully utilized, would result in a benefit to the system. Importantly, MPPA's actuary does not dispute any of PERB's actuary's findings. As a matter of fact, MPPA's actuary, upon replication of PERB's study reached statistically similar findings. However, PERB's actuary made prospective assumptions about members' usage of the DROP

program. MPPA's actuary retrospectively examined the data to determine what was actually happening.

Based upon the data provided to MPPA by the PERB as of June 30, 2006, the average length of service for all active participants who had entered the DROP prior to June 30, 2006, was 23 years rather than the 20 years assumed by the PERB's actuary. Basically, our study shows that if 33% of actives enter DROP as PERB's actuary assumes, but do so after attaining 23 years of service (as the data indicates) rather than after the assumed 20 years of service, there is no additional cost to the Plan to eliminate member contributions during the DROP period. In essence, the additional years of service compensates the system for the decrease in employee contributions to the system. In addition, our actuary report indicates that if 66% of actives enter DROP upon attaining 23 years of service, the system actually benefits. Importantly, the costs have been calculated using the same actuarial assumptions and methods as those shown in the PERB's actuarial consultant report, adjusting only the assumed service at DROP from 20 years to 23 years..

The fiscal note reflects only the loss of employee contributions to the system. It does not reflect the reality of the additional years of service of the police officers. Montana's police officers respectfully request the passage of HB 266.

**From:** "Kent A. Spade" <KentSpade@savitz.com>  
**To:** "Pamela Bucy" <PBucy@luxanmurfitt.com>, "Jerry ...  
**Date:** 1/22/2009 1:45 pm  
**Subject:** Montana MPORS - DROP Study

**CC:** "Thomas Graham" <ThomasGraham@savitz.com>  
Hi Pam and Jerry,

Attached is our study on the impact of eliminating the member contributions during the DROP period.

Note that the first column of numbers is from Milliman's 2006 valuation report. The second column is our results using all of the same assumptions that Milliman used.

The third column shows what our valuation would look like based on no member contributions during the DROP period and assuming that those that enter DROP do so after an average of 23 years of service rather than Milliman's assumption of 20 years of service.

Basically, our study shows that if 33% of actives enter DROP upon attaining 23 years of service and do not make contributions during the DROP period (the average of 23 years has been borne out based on the plan data provided to us by the MPERA, there is no material difference in cost than if they entered the DROP after 20 years of service (which has not been the experience) and made contributions while in DROP. Said another way, because employees are working longer than assumed, the System is benefitting financially from those active participants who enter DROP and continue to make contributions in the amount of 9% of pay.

The comparison to be made is between column 2 and column 3 (or between column 2 and column 4). If Milliman performed the study using the revised DROP entry assumptions, I would expect the cost savings to be very similar.

Please let me know if there are any questions.

Best regards,

Kent

<<Study Memo 2006 final.pdf>>

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**To:** Pamela Bucy - Luxan & Murfitt, PLLP

**From:** Kent A. Spade, FSA - The Savitz Organization, Inc.

**Date:** January 22, 2009

**Subject:** Montana Municipal Police Officers' Retirement System

The purpose of this memorandum is to report the estimated financial impact to the System associated with eliminating the requirement that members contribute to the System while participating in the Deferred Retirement Option Plan (DROP)

## Background

Currently, the legislation provides that members contribute 9% of compensation while they are in the DROP program, although no additional benefits are earned by the participant while they are a participant in DROP.

The Plan's Actuary has assumed that 33% of all active participants elect to enter the DROP upon first attainment of 20 years of service in their recent actuarial valuations of the System. The Actuary has also studied the impact if 66% of active participants elect to enter the DROP.

## Analysis

Based on the data provided to us by the Montana Public Employee Retirement Administration as of June 30, 2006, the average length of service for all active participants who had entered the DROP prior to June 30, 2006 was 23 years rather than the 20 years assumed by the System's actuary. We have prepared a study to reflect this finding.

The following chart summarizes the results of the study as of June 30, 2006:

	Milliman's Results	Savitz' Replication	Savitz' Assumptions (33% DROP)	Savitz' Assumptions (66% DROP)
Normal Cost (\$000)	\$ 7,148	\$ 7,135	\$ 6,991	\$ 6,764
Normal Cost Rate	25.45%	25.40%	24.89%	23.51%
Accrued Liability- Actives (\$000)	116,064	118,426	117,273	115,346
Unfunded Accrued Liability (\$000)	115,180	117,542	116,389	114,462
Statutory Funding Rate	52.78%	52.78%	52.08%	51.38%
Amortization Period (Years) of UAAL	21.4	22.0	21.9	20.6

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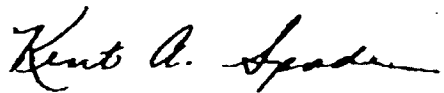
Pamela Bucy - Luxan & Murfitt, PLLP

January 22, 2009

The costs have been calculated using the same actuarial assumptions and methods as those shown in the report of the June 30, 2006 actuarial valuation with the exception of the change in the DROP entry assumption as described above.

We are available to answer any questions or provide additional analysis as needed.

Respectfully submitted,

A handwritten signature in black ink, reading "Kent A. Spade". The signature is written in a cursive style with a large initial "K" and a long, sweeping underline.

Kent A. Spade  
Fellow of the  
Society of Actuaries

NANCY SWEENEY  
CLERK-DISTRICT COURT

2007 NOV -1 P 2:52

FILED

*[Signature]*

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9 *Attorney for Montana Police Protective Association*

10 MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

11 MONTANA POLICE PROTECTIVE  
12 ASSOCIATION,

13 Petitioner,

14 -v-

15 PUBLIC EMPLOYEES' RETIREMENT  
16 BOARD OF THE STATE OF MONTANA,

17 Respondent.

Cause No: BDV 2007-852

**PETITION FOR DECLARATORY  
JUDGMENT AND RELEASE OF  
INFORMATION**

*pd ✓*

18 COMES NOW, the Montana Police Protective Association and for its petition  
19 against the Montana Public Employees' Retirement Board of the State of Montana, states  
20 and alleges as follows:

21 1. This is an action seeking release of public information held by the Montana  
22 Public Employees Retirement Administration. The action is brought pursuant to Article II,  
23 Section 9 of the Montana Constitution and Mont. Code Ann. §§ 2-6-101 through -112. The  
24 action is also brought pursuant to the Uniform Declaratory Judgments Act, Mont. Code Ann.  
25 §§ 27-8-101 through 27-8-313, seeking a declaration of the Montana Police Protective  
Association's right of access to the information sought.

2. The Montana Police Protective Association ("MPPA") is a Montana not-for-  
profit mutual benefit corporation, with its principal office in Butte. MPPA was established



1 in 1930, and is comprised of 579 sworn Montana Peace Officers from 18 separate local  
2 agencies across the state. MPPA is a provider of and proponent for programs and benefits  
3 for police officers, and represents the interests of police officers and law enforcement in  
4 legislative advocacy efforts. The members of MPPA are individual members of the  
5 Montana Police Officers' Retirement System ("MPORS").

6 3. The Public Employees' Retirement Board ("PERB") is an independent,  
7 seven-member board, appointed by the Governor to administer eight retirement systems and  
8 the State's Deferred Compensation Plan, with its principal office in Helena. Venue is  
9 appropriate pursuant to Mont. Code Ann. §19-2-401. The Board oversees the Montana  
10 Public Employee's Retirement Administration ("MPERA"), and its authority includes  
11 administration of the Montana Police Officers' Retirement System ("MPORS"). Article  
12 VIII, § 15 of the Montana Constitution provides that "Public retirement system assets,  
13 including income and actuarially required contributions, shall not be encumbered, diverted,  
14 reduced, or terminated and shall be held in trust to provide benefits to participants and their  
15 beneficiaries and to defray administrative expenses," and that PERB shall "shall administer  
16 the system, including actuarial determinations, as fiduciaries of system participants and their  
17 beneficiaries."

18 4. In 2001, the legislature enacted a program referred to as the Deferred  
19 Retirement Option Program ("DROP"). Mont. Code Ann. § 19-9-1202 through -1208.  
20 MPORS members that are otherwise eligible for retirement can file a one-time irrevocable  
21 election to participate in DROP for anywhere from one to five years. Mont. Code Ann. §  
22 19-9-1204.

23 a. During the period in which the member is participating in DROP:

24 1. A participant remains a member of the retirement system, but  
25 may not receive membership service or service credit in the  
retirement system. Mont. Code Ann. § 19-9-1204(4).

2. PERB calculates the amount equal to the monthly benefit that

1 would have been payable to the participant had the participant  
2 terminated service and retired, and holds that amount in a DROP  
3 account associated with the MPORS member. Mont. Code Ann.  
4 § 19-9-1202.

5 3. Contributions by the MPORS member, state and employer must  
6 continue to be paid to the retirement system at the same level as  
7 if the member was receiving service credit in the retirement  
8 system. Mont. Code Ann. § 19-9-1205.

9 b. Upon the expiration of the DROP period:

- 10 1. The member can continue covered employment with a police  
11 department, but PERB considers the member newly hired as of  
12 the date the DROP period ended. Mont. Code Ann. § 19-9-1207.  
13 2. The member is immediately vested for benefits accrued prior to  
14 the DROP period and can also earn service credit after the  
15 DROP period. *Id.*

16 c. Upon termination of service from employment, the member is entitled to  
17 receive a distribution of the DROP benefit, plus interest, plus regular  
18 retirement benefits to which the officer is entitled. Mont. Code Ann. § 19-  
19 9-1208.

20 5. Upon information and belief, the Montana DROP is the only deferred  
21 retirement option program in the nation where the member must continue to making full  
22 employee contributions to the system during the DROP period, yet receives no  
23 corresponding benefit – either in terms of allocation of some or all of that contribution to the  
24 member's DROP account or in terms of continuing service credits – attributable to that  
25 contribution and DROP period.

6. During legislative consideration of the DROP, PERB's actuarial consultant  
provided MPERA (and, ultimately, the legislature) with several analyses of the potential

1 fiscal impact of various facets of the program under consideration.

2  
3 7. On or about November 2, 2006, PERB's actuarial consultant provided  
4 MPERA with a draft Actuarial Impact statement ("Nov. 2, 2006 Milliman Report"). Among  
5 other things, the draft report found that, even as currently structured with the member  
6 deriving no benefit attributable to the member contribution during the DROP period, the  
7 Program is not cost-neutral, and increases the MPORS Actuarial Liability. (TAB 1)

8 8. The November 2, 2006 Milliman report also provided:

9  
10 Milliman's work product was prepared exclusively for  
11 MPERA for a specific and limited purpose. It is a complex,  
12 technical analysis that assumes a high level of knowledge  
13 concerning MPERA's operations, and uses MPERA's data,  
14 which Milliman has not audited. **It is not for the use or  
15 benefit of any third party for any purpose. Any third  
16 party recipient of Milliman's work product who desires  
17 professional guidance should not rely upon Milliman's  
18 work product, but should engage qualified professionals  
19 for advice appropriate to its own specific needs.**

20 *Id.* (emphasis added).

21 9. On behalf of its members participating in or considering DROP, MPPA has  
22 retained its own actuary to review the Montana DROP and assess whether MPPA's actuary  
23 agrees with the assumptions and conclusions reached by PERB's actuary in the Nov. 2, 2006  
24 Milliman Report.

25 10. By letter dated June 12, 2007, MPPA, through its counsel requested  
information from MPERA, including "[m]aterials available to Milliman in preparing their  
memo dated November 2, 2006." The letter also sought information such as the sex, date of  
birth, date of hire, date of termination or retirement, earnings, years of service and pension  
benefits for each of the members of the MPORS system, as well as date of birth and gender  
for certain beneficiaries. (TAB 2)

1  
2 11. On June 25, 2007, MPERA's legal counsel denied the request, concluding  
3 that "there is no way to sanitize the information in a way that would give [MPPA] usable  
4 information while protecting the privacy interests of the members." (TAB 3)

5 12. On July 14, 2007, MPPA responded and requested that PERB review the staff  
6 counsel's decision. (TAB 4) In its letter, MPPA further clarified it is not interested in  
7 receiving any information that would identify the individual member of MPORS or  
8 beneficiary, such as name or social security number, and would be happy to work with  
9 MPERA to jointly seek a protective order from a district court permitting disclosure of the  
10 data only to MPPA's actuarial consultant. *Id.*

11 13. On September 12, 2007, PERB upheld the staff decision not to provide the  
12 data, and through counsel expressed that it "was not interested in affirmatively attempting to  
13 find a way to disclose information it has a fiduciary responsibility to hold confidential."  
(TAB 5)

14 14. MPPA requested reconsideration, explaining that Attorney General opinions  
15 and judicial authority have already concluded that (a) state employee's name, title, dates and  
16 duration of employment, and salary are public information, (b) payroll information,  
17 including addresses, for private employees working on publicly funded projects are  
18 disclosable; and (c) even time records, showing such personal information as sick leave  
19 taken, have been held by the Attorney General to be subject to public disclosure. (TAB 6)  
20 MPPA further explained that it is seeking less identifying information than that which has  
21 already been required, and its interest is in permitting its members, to which PERB serves as  
22 a fiduciary, to assess whether the actuarial information provided to and by MPERA is  
23 accurate. *Id.*

24 15. In response, MPERA's staff counsel provided analysis to PERB that (a) the  
25 request for earning and benefit information in a way that associates it with the date of birth  
and gender is prohibited, because date of birth and gender are "part of each member's

1 privacy interests” and as a result the rest of the information sought is as well; and (b) the  
2 merits of public disclosure to MPPA and its members is “nonexistent” or “minimal”  
3 because (i) PERB’s actuary has professional qualifications, (ii) PERB’s actuary was subject  
4 to a third-party actuarial audit two years prior to the Nov. 2, 2006 Milliman Report; (iii)  
5 there is a “complete absence of any concerns over [the Actuary’s] work on behalf of the  
6 Board;” and (iv) “the Board is constitutionally-empowered to administer the MPORS.  
specifically including actuarial aspects of the system.” (TAB 7)

7  
8 16. On November 1, 2007, the Board denied MPPA’s request for reconsideration,  
9 and refuses to provide MPPA with the data sought and used by PERB’s actuary in creating  
10 the Nov. 2, 2006 Milliman Report. The Board’s Motion stated it was upholding the staff  
11 determination “because the members’ privacy interests in that information outweighs the  
merits of public disclosure.” *Id.*

12 17. Because PERB refuses to provide MPPA with the data for review by its  
13 actuary, or otherwise work with MPPA to reach a suitable accommodation to provide the  
14 information subject to a protective order, MPPA is denied the opportunity to assess whether  
15 PERB is fulfilling its fiduciary duties to MPPA’s members.

#### 16 17 **FIRST CLAIM FOR RELIEF**

18 **(Declaratory Judgment that there is no privacy interest in redacted MPORS member**  
19 **information that clearly exceeds the merits of public disclosure)**

20 18. MPPA incorporates paragraphs 1 through 17 above as if fully set forth herein.

21 19. Article II, Section 9 of the Montana Constitution provides, “No person shall  
22 be deprived of the right to examine documents or to observe the deliberations of all public  
23 bodies or agencies of state government and its subdivisions, except in cases in which the  
24 demand of individual privacy clearly exceeds the merits of public disclosure.” Further,  
25 Article II, Section 8 of the Montana Constitution provides, “The public has the right to  
expect governmental agencies to afford such reasonable opportunity for citizen participation

1 in the operation of the agencies prior to the final decision as may be provided by law.”

2 20. Montana Code Ann. §§ 2-6-102 and -110 provide that every citizen has the  
3 right to inspect and take a copy of any public writings and electronic information of the state,  
4 except where there is an individual privacy interest that clearly exceeds the merits of public  
5 disclosure.

6 21. PERB is a public board with members appointed by the Governor to  
7 administer the Montana Public Employee’s Retirement Administration and MPORS.  
8 Therefore, pursuant to Mont. Code Ann. §2-3-203, PERB is a public entity subject to the  
9 requirements of Article II, Sections 8 and 9; the Open Meeting Law, the Public Participation  
10 Law, and Section 2-6-101, et seq.

11 22. The information sought by MPPA, on behalf its members that are also  
12 members of MPORS, does not implicate individual privacy interests of the MPORS  
13 members that must be protected by PERB.

14 23. Alternatively, any privacy interest implicated by MPPA’s request does not  
15 clearly exceed the merits of public disclosure to MPPA.

16 **SECOND CLAIM FOR RELIEF**  
17 **(Petition for release of information)**

18 24. MPPA incorporates paragraphs 1 through 23 above as if fully set forth herein.

19 25. PERB is a public board with members appointed by the Governor to  
20 administer the Montana Public Employee’s Retirement Administration and MPORS.  
21 Therefore, pursuant to Mont. Code Ann. § 2-3-203, PERB is a public entity subject to the  
22 requirements of Article II, Sections 8 and 9; the Open Meeting Law, the Public Participation  
23 Law, and Section 2-6-101, et seq.

24 26. In its letter dated June 12, 2007, MPPA requested that PERB provide access  
25 to documents which constitute public information pursuant to Article II, Section 9 and Mont.  
Code Ann. § 2-6-101.

27. PERB and its officers are required to provide access to the data sought “upon

1 demand" pursuant to Montana Code Ann. § 2-6-102.

2 28. No privacy interests, trade secrets, or safety interests exist which alleviate  
3 PERB's duty to provide access to the information sought by MPPA. See Mont. Code Ann. §  
4 2-6-102(3).

5 29. Even if a portion of the information requested constituted a privacy interest,  
6 "[a] public officer may not withhold from public scrutiny any more information than is  
7 required to protect an individual privacy interest or safety or security interest." Section 2-6-  
8 102(4), MCA.

9 30. Alternatively, any privacy interest implicated by MPPA's request does not  
10 clearly exceed the merits of public disclosure to MPPA.

11 31. PERB must provide MPPA with the information sought in its June 12, 2007  
12 letter.

#### 13 **PRAYER FOR RELIEF**

14 Wherefore, MPPA prays for judgment against PERB as follows:

15 1. That this Court declare that PERB cannot withhold the information request by  
16 MPPA in its June 12, 2007 letter.

17 2. That this Court order that PERB provide MPPA the information sought in its June  
18 12, 2007 letter.


19 3. That MPPA be awarded attorneys' fees and costs associated with this action pursuant  
20 to Mont. Code Ann. § 2-3-221 and Mont. Code Ann. § 27-8-313.

21 \\\

1  
2 4. That MPPA be awarded such other equitable and supplemental relief as the Court  
3 may deem appropriate.

4 DATED this 1st day of November, 2007.

5  
6 **BULLOCK LAW FIRM, PLLC**

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November 2, 2006

VIA E:MAIL

Ms Roxanne Minnehan, Executive Director  
Montana PERA

**Re: Actuarial Impact Statement for Proposed 2007 Legislation  
MPORS DROP Provisions**

Dear Roxanne:

The purpose of this report is to estimate the fiscal impact of proposed changes to Montana retirement law. The figures presented in this report have been estimated based on the findings in the 2006 actuarial valuations.

#### **SUMMARY OF AMENDMENT**

Our understanding of the impact of the provision of this proposal on the Retirement Systems' benefits or funding, based on our discussion with the MPERA staff, is as follows:

*MCA 19-9-1205 will be modified such that contributions for members of the Municipal Police Officers' Retirement System (MPORS) will cease upon entry in to the Deferred Retirement Option Plan (DROP). Member contributions for current DROP participants will cease June 30, 2007.*

We have not explored any legal issues with respect to the proposed changes. We are not attorneys and cannot give legal advice on such issues. We suggest that you review this proposal with your own counsel.

Based on the Board's policy, we recommend that all new legislative proposals include a provision for financing the entire cost of the proposal.

#### **DATA, METHODS AND ASSUMPTIONS**

These modified provisions will not directly impact the benefits of any member. However, members participating in the DROP will no longer be required to continue to make member contributions.

We have developed this analysis based on the data, methods, and assumptions contained in the actuarial valuations of the Systems performed as of June 30, 2004 and 2006. In addition, we made the following assumptions with respect to this proposal:



- For purposes of this fiscal impact statement, we assumed that this is the only statutory amendment being considered. If other provisions are enacted, the actuarial cost impact associated with this amendment may be different.
- We have not made any adjustment for actuarial gains or losses that may have emerged since the last valuation date, June 30, 2006.
- We have increased the assumed DROP election rate from 33% to 66% for two reasons: First, actual DROP election rate experience appears to be greater than we assumed and we expect the assumption will need to be modified based on the next Experience Study. Secondly, it is reasonable to assume that the election rate for the DROP will increase if member contributions are no longer required.

#### FISCAL IMPACT

The DROP was originally expected to be cost-neutral. That is, the implementation of the program was not expected to increase the cost of the System, nor increase the period of time expected to amortize the Unfunded Actuarial Liability. Based on information contained in the 2004 and 2006 valuations, we have several conclusions:

- More members than originally estimated have entered the DROP. Our assumption is that one-third of the members who become eligible upon attaining 20 years of service would elect to enter the DROP at that time. Although a more detailed analysis will be required during the next Experience Study, the current data indicates the election rates have been greater than assumed.

Years of Service at July 1, 2006	Active & DROP	DROP Members	Percent in DROP
20 – 24	43	17	40%
25 – 29	20	15	75%
30 & up	<u>12</u>	<u>9</u>	<u>75%</u>
Total	75	41	55%

- Details underlying the 2004 Actuarial Valuation of MPORS indicate that the DROP is not cost-neutral. The table below shows the amortization period for the Unfunded Actuarial Liability using the current contribution revenue, plus the Normal Cost Rate and the 30-year amortization payment.

Assumptions & Benefits	Amortization Period	30-Year Funding
2002 Set	23.2 yrs.	49.00%
Assumptions	0.2	0.16
DROP (incl. DROP election rate)	<u>1.0</u>	<u>0.47</u>



Total	24.4 yrs.	49.63%
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From this information we can conclude that the DROP was not cost-neutral as of July 1, 2004. The amortization period was extended 1.0 years with the current contribution rates (including the DROP members' contributions during the DROP period). Alternatively, at the 30-year funding policy, the contribution rate would have needed to be increased by 0.47% of salaries to finance the DROP. The primary reason for a DROP not to be cost-neutral is the shorter period of time to finance the benefits. Members electing to retire sooner than expected, particularly with a full pension at 20 years of service, tend to increase the basic cost of a system.

- We have calculated that the cessation of member contributions for those participating in the DROP will lower the average member contribution rate from 9.00% of salaries to 8.30% of salaries. Without any changes to the actuarial assumptions, a revenue reduction of 0.70% of salaries would extend the amortization period from 21.4 years to 22.2 years.
- Based on the revised assumed DROP election rate, the Actuarial Liability would increase by about \$3.9 million, the total contributions expected to come into the System would decline by 0.70% of all salaries, and the amortization rate would increase to 25.1 years.
- Although the contributions are currently expected to amortize the Unfunded Actuarial Liability over about 21 years, this should not be considered extremely well funded. The average working lifetime is closer to the 21 years than the 30-year amortization policy. The Retirement Board may wish to revisit its 30-year funding policy for the public safety systems.

Based on our understanding of this proposal and the data, methods and assumptions outlined above, we have attached an estimated impact on the funding of the Systems, based on the 2006 Actuarial Valuations. Please refer to the valuation reports for more details about the data, methods, assumptions, and plan provisions used.

These cost estimates are subject to the uncertainties of a regular actuarial valuation; the costs are inexact because they are based on assumptions that are themselves necessarily inexact, even though we consider them reasonable. Thus, the emerging costs may vary from those presented in this letter to the extent actual experience differs from that projected by the actuarial assumptions.

Milliman's work product was prepared exclusively for MPERA for a specific and limited purpose. It is a complex, technical analysis that assumes a high level of knowledge concerning MPERA's operations, and uses MPERA's data, which Milliman has not audited. It is not for the use or benefit of any third party for any purpose. Any third party recipient of Milliman's work product who desires professional guidance should not rely



Ms. Roxanne Minnehan  
November 2, 2006  
Page 4

upon Milliman's work product, but should engage qualified professionals for advice appropriate to its own specific needs.

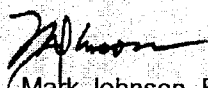
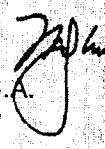
This analysis was prepared in accordance with generally recognized and accepted actuarial principles and practices which are consistent with the applicable Standards of Practice adopted by the Actuarial Standards Board of the American Academy of Actuaries. The undersigned is an independent actuary, a Fellow of the Society of Actuaries, a Member of the American Academy of Actuaries, an Enrolled Actuary, experienced in performing valuations for large public employee retirement systems, and meet the Qualification Standards of the American Academy of Actuaries to render the actuarial opinion contained herein.

Any distribution of this report must be in its entirety, including this cover letter, unless prior written consent is obtained from Milliman.

*At your request, we have provided this DRAFT report prior to completion of our internal peer review. Because this is a draft, Milliman does not make any representation or warranty regarding the contents of the report. Milliman advises any reader not to take any action in reliance on anything contained in the draft report. All parts of this report are subject to revision or correction prior to the release of the final report, and such changes or corrections may be material.*

If you have any questions or need further information, please let me know.

Sincerely,

  
Mark Johnson, F.S.A.  
Consulting Actuary 

MOJ:j mrs:l:062102

MILLIMAN

# Montana PERA - Actuarial Impact Statement

Attached to Letter Dated November 2, 2006

## Pension Fund Fiscal Note

	2006 Actuarial Valuation	July 1, 2006 Results with Changes <sup>(1)</sup>	Increase (Decrease)
<b>Actuarial Balance Sheet (\$000)</b>			
Present Value of Benefits	\$ 353,611	\$ 355,305	\$ 1,694
Future Normal Costs	<u>62,512</u>	<u>60,294</u>	<u>(2,218)</u>
Actuarial Liability	\$ 291,099	\$ 295,011	\$ 3,912
Actuarial Value of Assets	<u>175,919</u>	<u>175,919</u>	<u>0</u>
Unfunded Actuarial Liability	\$ 115,180	\$ 119,092	\$ 3,912
<b>30-Year Funding Rates</b>			
Normal Cost Rate	25.45%	26.58%	1.13%
30-Year Amortization	<u>22.17</u>	<u>22.92</u>	<u>0.75</u>
Total 30-Year Funding Rate	47.62%	49.50%	1.88%
<b>Resources</b>			
Average Member Rate	9.00%	8.30%	
Employers	14.41	14.41	
State of Montana	<u>29.37</u>	<u>29.37</u>	
Total Contribution Rate	52.78%	52.08%	(0.70)%
<b>Amortization Period</b>	21.4 yrs.	25.1 yrs. <sup>(2)</sup>	3.7 yrs.

### Notes:

- (1) Includes an increase in the assumed DROP election rate from 33% to 66% at the attainment of eligibility 20 years of service.
- (2) The amortization period would be 22.2 years without the change in the actuarial assumption.

*At your request, we have provided this DRAFT report prior to completion of our internal peer review. Because this is a draft, Milliman does not make any representation or warranty regarding the contents of the report. Milliman advises any reader not to take any action in reliance on anything contained in the draft report. All parts of this report are subject to revision or correction prior to the release of the final report, and such changes or corrections may be material.*



This work product was prepared solely for the Montana Public Employees' Retirement Administration and may not be appropriate to use for other purposes. Milliman does not intend to benefit and assumes no duty or liability to other parties who receive this work.

# BULLOCK LAW FIRM<sup>PLLC</sup>

Stephen C. Bullock  
406.443.4331  
sbullock@bullockfirm.com

June 12, 2007

Great Northern Town Center  
30 West 14th Street, Suite 204  
Post Office Box 1330  
Helena, Montana 59624

## VIA E-MAIL AND FIRST CLASS MAIL

Roxanne Minnehan  
Montana Public Employees Retirement Administration  
100 North Park, Suite 200  
P.O. Box 200131  
Helena, MT 59620-0131

*Re: Information Request; MPORS Deferred Retirement Option Program*

Dear Roxanne:

I am writing as counsel to the Montana Police Protective Association ("MPPA"). As you know from our earlier discussions, MPPA has concerns regarding the current structure of the MPORS Deferred Retirement Option Program ("DROP") in that the officer continues making contributions to the system while in DROP, but does not appear to receive any benefit relating to those contributions.

I recall your providing a draft actuarial impact statement prepared by Milliman in November 2006, and am curious whether Milliman made any changes or otherwise finalized that statement.

Additionally, you may recall in our meeting last year we discussed the possibility that we might retain an actuary or other consultant to review the underlying data on our behalf. We have done so, and I would appreciate it if you could assist us by electronically providing information for their review.

We are primarily interested in receiving the same materials that Milliman had in advance of their November 2006 report. Given that it was already gathered to provide your consultant, I assume that it should be a relatively painless process to provide the same to us. If my assumption is misplaced, please advise.

Additionally, there may be a couple of items on our request list that were not provided to Milliman last fall. Please advise if there are any significant obstacles to providing this information.

At this point, I am requesting that you provide me with the following:

1. Copy of the most recent MPORS experience study.
2. All valuation reports for the MPORS covering the dates from 2000 to the present.
3. Materials available to Milliman in preparing their memo dated November 2, 2006.

- a. In case it is not included 4.a. below, for each of the 41 DROP members as of June 30, 2006, identify age (or date of birth), years of service (or date of hire), initial pension benefit when they entered DROP, date they entered DROP and the number of years they have elected to participate in the DROP program.
4. For each MPORS participant, please provide the following information as of July 1, 2006:
  - a. **Actives:** Sex, Date of Birth, Date of Hire, Credited Service, Pensionable Earnings for the past five years, and if applicable, the date they entered DROP, DROP period, and DROP benefit.
  - b. **Terminated Vesteds** – Sex, Date of Birth, Date of Termination, Date benefit is payable, Amount of Benefit.
  - c. **Retirees** – Sex, Date of Birth, Date of Hire, Date of Retirement, Form of Pension, Spouses Date of Birth if applicable, etc.
5. If not included in 4.c. above, by year, please provide the age and years of service at retirement of those members who have retired from 1996 to the present. (including the date they entered DROP and the date they subsequently retired), initial retirement (or DROP) benefit.
6. Value of Plan Assets as of June 30, 2006 and as of the most recent date available.

Please tell me if any of these requests are unclear. I imagine that MPERA's principle concern is providing the information in a format that does not implicate any privacy interests. If this is a problem, we are more than happy to work with you to ensure that your obligations are met.

It would be helpful if you could tell me when you think we might be able to get this material. Time is of the essence, in that there is an Association meeting mid-July, and we would like to allow our consultants to review the material for several weeks in advance of that meeting. I am optimistic that we can work together in a non-adversarial manner and appreciate your help in promptly providing this material.

Best regards,

**BULLOCK LAW FIRM, PLLC**

By: 

Stephen C. Bullock

c: Jerry Williams

# PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION

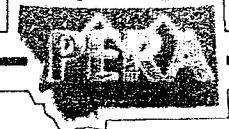


BRIAN SCHWEITZER  
GOVERNOR

STATE OF MONTANA

HELENA (406) 444-3154  
TOLL FREE (877) 275-7372  
FAX (406) 444-5428

mpera.mt.gov



100 N. PARK, SUITE 200  
PO BOX 200131  
HELENA, MT 59620-0131

June 25, 2007

Mr. Stephen Bullock  
Bullock Law Firm  
P.O. Box 1330  
Helena, MT 59624

RE: MPORS Information Request

Dear Mr. Bullock:

As requested in your June 12, 2007, letter, I have e-mailed you a copy of the most recent MPORS experience study, all MPORS valuation reports from the year 2000 to the present, and the value of the MPORS as of June 30, 2006, and May 31, 2007, the latest date for which we have that information. Unfortunately, due to privacy concerns we are unable to furnish you with any of the remaining information.

I have reviewed the type of information Milliman used for its November 2, 2006, memo, as well as the information Milliman uses for its valuations. Even if section 2.43.303(2), ARM, did not prohibit its disclosure to third parties without member authorization, there is no way to sanitize the information in a way that would give you usable information while protecting the privacy interests of the members.

We are also prohibited from releasing this type of information by our internal confidentiality policies. While that policy allows us to distribute otherwise confidential information "in a manner that protects the individual privacy of the member or retiree," such as in summary form, the information you request is more detailed than the policy would permit us to disclose.

It is also my opinion that the information is confidential under the Missouliau balancing test. See Missouliau v. Board of Regents, 675 P.2d 962 (1984). The information you request is certainly a matter of each member's individual privacy; age, retirement income, retirement dates, and beneficiary information all directly relate to numerous privacy interests of our members. Because of the size of the system, even disclosing a member's gender may violate the member's privacy rights.

The privacy interests inherent in the personal information you request also outweighs the merits of public disclosure in this case. The use to which you seek to put this information is to verify the actuarial findings of the Board's actuary, Mark Johnson, who is a Fellow



Mr. Stephen Bullock  
June 25, 2007  
Page 2 of 2

of the Society of Actuaries, a Member of the American Academy of Actuaries, and an Enrolled Actuary. Mr. Johnson's work on behalf of the Board was subjected to an actuarial audit by a third-party actuarial firm, Mellon, relative to the PERS in 1994. In its actuarial audit report, Mellon stated that, "[w]e found the work to be reasonable and performed in accordance with generally accepted actuarial principles and practices." Given the complete absence of any concerns over Mr. Johnson's work on behalf of the Board, the merits of public disclosure in this case are virtually nonexistent.

The fact that the Board is constitutionally-empowered to administer the MPORS, specifically including the actuarial aspects of the system, also negates any possible merits of public disclosure in this case. See Montana Constitution Article VIII, Section 15(2); Baumgardner v. Public Emples. Ret. Bd. of MT, 2005 MT 199. The significant individual privacy concerns surrounding the release of the information therefore substantially outweigh the minimal merits of public disclosure in this case.

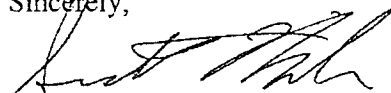
Further complicating the issue is that information on disability benefits implicates the HIPAA privacy requirements. Given all of the above, we are unable to furnish you with any of the remaining information you request.

***You may appeal this staff decision by notifying the Public Employees' Retirement Board in writing at the address above within 30 days from the date of this letter.*** The Board would then make its preliminary decision on the basis of material properly submitted 21 days in advance of the Board meeting at which the matter is considered. The Board would then notify you of its preliminary decision. If the decision is adverse to you, you would be given two options, either of which must be exercised within 30 days if you wish to further appeal the issue:

- 1) You could submit a request in writing for reconsideration by the Board. If the Board again decides adversely to you, you could appeal that decision to an administrative hearing; or
- 2) You could submit a request to proceed directly to an administrative hearing.

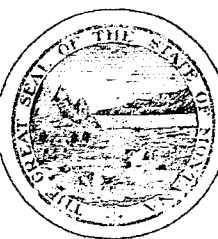
Please feel free to contact me if you have any further questions.

Sincerely,



Scott A. Miller  
Legal Counsel

# PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION

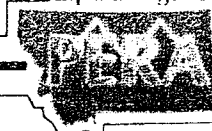


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PO BOX 200131  
HELENA, MT 59620-0131

June 25, 2007

Mr. Stephen Bullock  
Bullock Law Firm  
P.O. Box 1330  
Helena, MT 59624

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Mr. Stephen Bullock  
June 25, 2007  
Page 2 of 2

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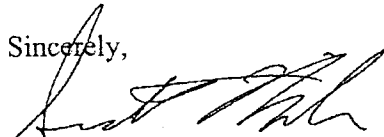
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***You may appeal this staff decision by notifying the Public Employees' Retirement Board in writing at the address above within 30 days from the date of this letter.*** The Board would then make its preliminary decision on the basis of material properly submitted 21 days in advance of the Board meeting at which the matter is considered. The Board would then notify you of its preliminary decision. If the decision is adverse to you, you would be given two options, either of which must be exercised within 30 days if you wish to further appeal the issue:

- 1) You could submit a request in writing for reconsideration by the Board. If the Board again decides adversely to you, you could appeal that decision to an administrative hearing; or
- 2) You could submit a request to proceed directly to an administrative hearing.

Please feel free to contact me if you have any further questions.

Sincerely,



Scott A. Miller  
Legal Counsel

# BULLOCK LAW FIRM<sup>PLLC</sup>

Stephen C. Bullock  
406.443.4331  
sbullock@bullockfirm.com

July 24, 2007

Great Northern Town Center  
30 West 14th Street, Suite 204  
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Helena, Montana 59624

Scott A. Miller, Esq.  
Montana Public Employees Retirement Administration  
100 North Park, Suite 200  
P.O. Box 200131  
Helena, MT 59620-0131

Montana Public Employees Retirement Board  
100 North Park, Suite 200  
P.O. Box 200131  
Helena, MT 59620-0131

*Re: Information Request; MPORS Deferred Retirement Option Program*

Dear Mr. Miller and Members of the Public Employee Retirement Board:

I am writing as counsel to the Montana Police Protective Association. I have read and carefully reviewed Mr. Miller's letter dated June 25, 2007.

I request that he and/or the Board reconsider the staff decision. Given that this is not necessarily an administrative decision within the meaning of Admin.R.Mont. 2.43.203, I am skeptical that the referenced administrative procedures are applicable. Nor would we need to exhaust administrative proceedings in order to pursue alternative avenues to receive the information. However, as I mentioned in discussing this with Mr. Miller in advance of sending our information request, I am hopeful that a nonadversial accommodation can be reached.

The letter emphasizes that Mr. Johnson is a member of a number of professional organizations and his work was subjected to an audit in 1994. Please understand that the most recent Actuarial Impact Statement Milliman provided relating to the MPORS DROP Program includes the following:

Milliman's work product was prepared exclusively for MPERA for a specific and limited purpose. It is a complex, technical analysis that assumes a high level of knowledge concerning MPERA's operations, and uses of MPERA's data, which Milliman has not audited. *It is not for the use or benefit of any third party for any purpose. Any third party recipient of Milliman's work product who desires professional guidance should not rely upon Milliman's work product, but should engage qualified professionals for advice appropriate to its own specific needs.*

*Letter from M. Johnson to R. Minnehan, dated November 2, 2006 at 3-4 (emphasis added).*

I hope we all appreciate the irony of the situation: On the one hand, MPERA's actuarial consultant disclaims that the Montana Police Protective Association -- and its members that are likewise members of the MPORS system -- should not rely upon the work product generated by MPERA's consultant. On the other hand, when MPPA "engage[s] qualified professionals for advice appropriate to [our] own specific needs," MPERS is unwilling to constructively work together to provide the information necessary for these qualified professionals to offer such advice.

To further clarify, we are *not* interested in receiving *any* information that would identify an individual member of the MPORS system. To the extent that the information provided to the Board's actuary includes identifying information such as name or social security number, we have no interest in that data and would ask that it be redacted or removed. Moreover, as I stated in writing and during my telephone conversation with Mr. Miller, I would be happy to work with you to ensure that any legitimate concerns you have about the information is met, be that through further limiting the data request or by jointly seeking a district court order permitting disclosure to our actuarial consultant, subject to a protective order that would relieve the Board of any real or perceived concerns regarding disseminating this information.

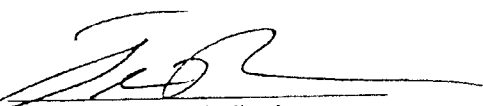
I agree that the Board is constitutionally empowered to administer the MPORS. I hope we can also agree that it is to do so as a *fiduciary* of its system participants. As the representative of many of those system participants, MPPA and its members are simply requesting the opportunity and ability to meaningfully review the actuarial assumptions provided to the Board relating to the DROP program. I would think you would encourage such a review.

Please contact me if you have any further direction, questions or concerns. I look forward to hearing from you.

Best regards,

**BULLOCK LAW FIRM, PLLC**

By:



Stephen C. Bullock

c: Jerry Williams

Mr. Stephen C. Bullock  
September 14, 2007  
Page 2 of 2

decide to ask the Board for reconsideration, you would have fifteen minutes to address the Board and present your client's case, and another five minutes to rebut any staff presentation. Any materials properly submitted 21 days in advance of the Board meeting would be considered. If the Board again denies your request, you could appeal that decision to an administrative proceeding as well. The next scheduled Board meeting is November 1, 2007. In any event, if you decide to ask the Board to reconsider or submit a request to proceed directly to an administrative hearing, you must do so within thirty days of the date of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott A. Miller", written over a horizontal line.

Scott A. Miller  
Legal Counsel

# BULLOCK LAW FIRM<sup>PLLC</sup>

Stephen C. Bullock  
406.443.4331  
sbullock@bullockfirm.com

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30 West 14th Street, Suite 204  
Post Office Box 1330  
Helena, Montana 59624

October 08, 2007

Scott A. Miller, Esq.  
Montana Public Employees Retirement Administration  
100 North Park, Suite 200  
P.O. Box 200131  
Helena, MT 59620-0131

*Re: Information Request; MPORS Deferred Retirement Option Program*

Dear Mr. Miller:

Thank you for your letter dated September 14, 2007. Before getting to its substance, I wanted to address your "not[ing] that there were no representatives of MPPA in attendance." As you may recall, you expressly informed me that, even if representatives were to attend, they would not be allowed to speak. You may also recall that I was unavailable the day the Board met, but wanted the decision reached to advance the process. Given that there was no opportunity to present any information that day, I am puzzled by your highlighting the lack of a representative at that meeting.

I also remain puzzled as to your suggestion that there is some exhaustion of administrative remedies necessary, and you may recall that I even asked the basis for that conclusion. Our request for information does not implicate "an individual's or an entity's legal rights, duties, or privileges pursuant to the provisions of Title 19, MCA." *Admin. R.Mont. 2.43.203*. Rather this is an information request of a governmental agency, provided for by Mont. Const. Art. II, sec. 9 and Mont. Code Ann. §§ 2-6-102, -104 *et seq.*, not Title 19. Moreover, I have also sought to provide alternatives to ease any concerns that you or the Board might have.

To summarize, we are not seeking the names, social security numbers, or other identifying information of any of the plan participants. Although I am at a loss why identifying information would even be provided to the Board's actuary, if it was, we have no concerns about your redacting the information, or replacing it with labels such as "Participant A."

I would imagine you already appreciate that the information of the type sought by our requests either does not implicate the right of privacy, or involves only a minimal intrusion. Individual privacy is involved only "when the information at issue reveals facts about an individual's attitudes, beliefs, behavior, and any other personal aspect of that individual's life." 38 *Op. Atty. Gen. Mont. 375 (1980) (quoting 37 Op. Atty. Gen. Mont. 112 (1979))*. A state employee's name, title, dates and duration of employment, and salary are public information. *Id.* The same holds true for payroll information, including addresses, for private employees working on publicly funded projects. 43 *Op. Atty. Gen. Mont. 6 (1989)*. Indeed, even time records, showing such personal information as sick leave taken, have been held by the Attorney General to be subject to public disclosure. 44 *Op. Atty. Gen. Mont. 32 (1992)*. Accordingly, even if we were interested in

receiving identifying information, it is constitutionally questionable upon what grounds the Board would assert that the privacy interest outweighs the right of access.

Moreover, any concerns the Board may continue to harbor are illusory once redactions or renaming occurs. Even in the context of personnel files, which are much more intrusive than the data sought here, the Supreme Court has held that, if employee records are released, the privacy interests are protected "by altering the information to provide for the anonymity of the person(s) involved. This will include the elimination of name, specific ethnic designations and other classifications which reasonably might allow identification of the person(s) whose privacy right is to be protected." *Montana Human Rights Div. v. Billings* (1982), 199 Mont. 434, 649 P.2d 1283.

Indeed, the Montana Supreme Court has directly addressed the issue of whether "the Montana Constitution authorize[s] disclosure of . . . redacted records." *Bd. of Trs. v. Cut Bank Pioneer Press*, 2007 MT 115, 337 Mont. 229, 160 P.3d 482. In *Pioneer Press*, two public school students were disciplined for shooting other students with plastic BBs on school property. At issue in part was whether the school district had to release records relating to the disciplinary action taken. The court held, *inter alia*:

Disclosing that "Student # 3 was suspended from school for two days for shooting BBs on school property" does not violate the student's or that student's parents' rights to privacy because such a report does not reveal the identity of "Student # 3." Any subjective expectation of privacy here, given Pioneer's limited request, would not be considered reasonable by society and is outweighed by the merits of public disclosure.

*Bd. of Trs. v. Cut Bank Pioneer Press*, 2007 MT 115, ¶ 36. It should be noted that this was the case even where the press already *acknowledged* that they knew the identities of the children involved. *Id.*, ¶ 36. In the instant matter, there is no way that an actuary in Pennsylvania would determine, or even have reason to try to determine, these identities. The same holds true for counsel.

Moreover, in your original letter you suggest that there is no merit to public disclosure because (a) the Board has hired a trusted actuary, and (b) the Board is constitutionally empowered to administer MPORS, including the actuarial aspects of the system. At the heart of this request is affording the plan participants – that are not only public servants but also members of the public – the opportunity to assess whether the information being provided to and by MPERS is correct. Effectively, the fiduciary is saying "trust us," but then denying the plan member and public any opportunity to independently assess whether that trust is warranted. "Disclosing such information increases public confidence in government, and consequently increases government's ability to serve the public." 38 *Op. Atty. Gen. Mont.* 375 (1980).



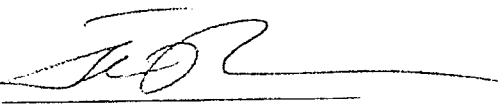
Scott A. Miller, Esq.  
October 8, 2007  
Page 3

I will attend the Board meeting, to be held November 1, 2007.

Please contact me if you have any further direction, questions or concerns.

Best regards,

**BULLOCK LAW FIRM, PLLC**

By:   
Stephen C. Bullock

c: Jerry Williams

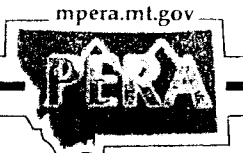
# PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION



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October 24, 2007

Mr. Stephen Bullock  
Bullock Law Firm  
P.O. Box 1330  
Helena, MT 59624

RE: MPORS Information Request

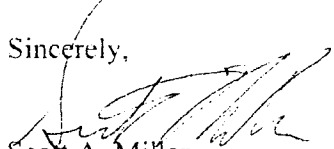
Dear Mr. Bullock:

I have received your October 8, 2007, letter. Your letter first expresses puzzlement that I bothered to point out that there were no representatives of MPPA in attendance at the September 13, 2007, Board meeting. I merely pointed that out because in your August 24<sup>th</sup> e-mail you indicated there would be an MPPA representative in attendance: "I am out of town on 9/13, but will have someone attend on our behalf." Since no one was in attendance, I believed it might be helpful to advise you of the fact. Unfortunately, my attempt at being helpful appears to have been interpreted as impertinence.

Your letter next expresses puzzlement at the administrative process of which I advised you. No, I don't recall you asking the basis for my conclusion that there is an applicable administrative process; your letters to not indicate such a question. In any event, the PER Board's policy regarding public information requires staff to allow a requester to appeal to the Board a denial of information that staff believes is confidential. Further, I would disagree with your conclusion that your request "does not implicate 'an individual's or an entity's legal rights, duties, or privileges pursuant to the provisions of Title 19, MCA.'" While the privacy rights enjoyed by our members are ultimately based on Article II, Section 10 of the Montana Constitution, the information you seek is derived from the provisions of Title 19. The decision to deny your information request therefore had the effect of making a determination regarding our members' legal right to privacy under Title 19. Accordingly, the decision was an "administrative decision" to which our administrative process applies.

As I advised you, the Board will consider your request at its November 1, 2007, meeting. The Board meeting begins at 8:30 a.m., and this is the first issue on the agenda. Enclosed is information I have forwarded to the Board in response to your argument.

Sincerely,

  
Scott A. Miller  
Legal Counsel

"AN EQUAL OPPORTUNITY EMPLOYER"

## INFORMAL RECONSIDERATION

November 1, 2007

**Petitioner:** Stephen Bullock, representing the Montana Police Protective Association

**Request for Board Consideration:**

Mr. Bullock asks the Board to reverse staff's determination that the information Mr. Bullock requested in paragraphs 3, 4 and 5 of his June 12, 2007, letter is confidential information, prohibited from public disclosure by rule and the fact that the significant individual privacy concerns of the individuals to whom the information relates outweigh the merits of public disclosure.

**Staff Recommendation:** Uphold staff determination denying the disclosure of information requested in paragraphs 3, 4 and 5 of the June 12, 2007, letter from Stephen C. Bullock because the members' privacy interests in that information outweighs the merits of public disclosure.

**Correspondence:**

June 12, 2007, letter from Stephen Bullock to Roxanne Minnehan requesting information.  
June 25, 2007, letter from Scott Miller to Mr. Bullock acknowledging the delivery of some of the information requested in the June 12, 2007, letter, but denying Mr. Bullock's request for the remaining information.  
July 24, 2007, letter from Mr. Bullock to Mr. Miller and the Board asking for a reconsideration of staff's decision.  
October 8, 2007, letter from Mr. Bullock to Mr. Miller providing legal argument.  
October 25, 2007, letter from Mr. Miller to Mr. Bullock in response to Mr. Bullock's October 8, 2007, letter.

**Relevant Law, Rules and Policies:**

The balancing test the Board must use to determine whether the requested information must be disclosed is described in the following Attorney General opinion:

**43 Op. Atty Gen. Mont. No. 25:**

Each Montanan's "right to know" is guaranteed by Article II, section 9 of the Montana Constitution, which states:

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

The right of individual privacy referred to in this section is guaranteed by Article II, section 10 of the Montana Constitution, which states:

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Opinions of the Montana Supreme Court and the Montana Attorney General have spoken of the need to reconcile these two rights. The Constitution requires that a potential conflict between the public's right to know and an individual's right of privacy be resolved by applying a balancing test. 42 Op. Att'y Gen. No. 64 (1988). The following balancing test for dealing with these questions has been developed:

- (1) [D]etermining whether a matter of individual privacy is involved,
- (2) determining the demands of that privacy and the merits of publicly disclosing the information at issue, and
- (3) deciding whether the demand of individual privacy clearly outweighs the demand of public disclosure.

42 Op. Att'y Gen. No. 64 (1988). See also Missoulain v. Board of Regents, 207 Mont. 513, 522, 527, 675 P.2d 962, 967, 970 (1983). It is the duty of each agency, when asked to disclose information, to apply these steps and make an independent determination within the guidelines of the law, subject to judicial review. 38 Op. Att'y Gen. No. 109 at 375, 376 (1980).

To determine whether an individual has a protected privacy interest, the Board must determine (1) whether the person had a subjective or actual expectation of privacy and (2) whether society would recognize that expectation as reasonable. The members do have an expectation that their specific retirement information will be private:

**ARM: 2.43.303 REQUEST FOR RELEASE OF INFORMATION  
BY MEMBERS**

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(2) Specific information, particular to a member or benefit recipient's account, will only be released upon receipt by the division of a written authorization signed by the member or benefit recipient.

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**Board Policy No. BOARD Gen 01:**

II. B. Public information that will be released to the public upon request:

1. The name of a member, retiree or other benefit recipient;
2. The name of a member's employing agency or a retiree's former employer;
3. The fact that a person is a member of a retirement system administered by the Board;
4. The retirement system of which a person is a member, retiree or benefit recipient;
5. The fact that a person is a retiree and is either receiving or has been approved to receive a benefit; and
6. The fact that a person is either receiving or has been approved to receive a benefit.

**Board Policy No. BOARD Gen 02:**

IV. B. The Board will release confidential information to the public only when one of the following exists:

1. a valid legal order;
2. a written release from the member or benefit recipient; or
3. a valid request to conduct a third party mailing pursuant to section A.

Mr. Bullock provides an accurate and concise statement of the law as it relates to the privacy interests individuals have in information devoid of identifying information. Under the MPPA's analysis, the question becomes whether society is willing to recognize our members' privacy interests in retirement information if that information is devoid of identifying information. In Bd. Of Trs. V. Cut Bank Pioneer Press, 2007 MT 115, the Supreme Court examined whether school children who had been disciplined had a privacy interest in the discipline that was meted out. The Cut Bank Pioneer Press did not ask for the identification of the children, but only the disciplinary action taken. The Supreme Court held that because the information did not reveal the identity of the students, "[a]ny subjective expectation of privacy here, given [the paper's] limited request, would not be considered reasonable by society and is outweighed by the merits of public disclosure." Id. at ¶ 36

Unlike in the Cut Bank case, however, the MPPA does not seek information that is completely devoid of identifying information – it specifically seeks the dates of birth of every MPORS member, which it would need for its actuary to accurately analyze the information. While not as specific as a social security number or a fingerprint, a person's date of birth is frequently used as an identification tool. The MPPA also asks for the sex of the members. In a male-dominated profession such as police work, sex can also be an identifying tool. Especially in a system with only 640 active members, 38 non-vested terminated members, 37 vested terminated members and 592 retirees and beneficiaries, a member's sex and unique date of birth is highly identifying. Thus, the Cut Bank decision is not as directly applicable as the MPPA argues.

In Montana Human Rights Div. v. City of Billings, 199 Mont. 434, 649 P.2d 1283 (1982), the Supreme Court considered whether a Montana state agency could obtain information on an employer's employees for purposes of determining whether the employer unlawfully discriminated against other employees. The Supreme Court determined that the state agency could obtain that information, but if the agency was required to later disclose that information to anyone outside the agency it had to do so in a manner that "protect[s] the privacy of any person(s) as to the elements of such information by altering the information to provide for the anonymity of the person(s) involved." Id. at 450. The Supreme Court directed the agency to eliminate the "name, specific ethnic designations and other classifications which reasonably might allow identification of the person(s) whose privacy right is to be protected." Id. The Supreme Court's indication that the release of a "specific ethnic designation" may be an unwarranted invasion of an individual's privacy indicates that a person's birthday, which is arguably a far more specific piece of individual information, combined with the person's sex would be subject to even more privacy protections.

In this case, the information sought for all members is the sex and date of birth. Depending on whether the member is active, terminated or retired, the MPPA further seeks each member's date of hire, date of termination, credited service,

earnings for the past five years, date any benefit was payable and the amount, form of pension, DROP election, DROP election date and the term elected for the DROP. Because the MPPA seeks the latter information in a way that associates it with each member's date of birth and sex, the latter information is part of each member's privacy interests. It is "[i]nformation which reveals facts concerning personal aspects of an individual's life [that] necessarily involve[s] individual privacy." 38 Op. Att'y Gen. No. 1 (1978). As such, the members not only have an objective expectation of privacy in that information, but, according to Supreme Court precedent, it appears that society would recognize that privacy interest.

Further support is found in 42 Op. Att'y Gen. No. 64, in which the Attorney General considered whether "the original documents or applications prepared by members of the Public Employees' Retirement System and submitted to the Public Employees Retirement Division of the Department of Administration [(now MPERA)] [are] open to public inspection for the purpose of compiling a mailing list." The Attorney General concluded as follows:

[A]pplicants to the Public Employees' Retirement system (PERS) have an expectation that the information provided about beneficiaries in their original applications will remain private. Does society consider this expectation reasonable? I believe it does. Because PERS is in part an insurance plan, Montana's Insurance Information and Privacy Protection Act is an indication of public policy in this area. See, for example, section 33-19-201, MCA, which restricts the use of information gathered for insurance transactions. Also, the policy of the Social Security Administration on the disclosure of information about individuals, 20 C.F.R. § 401.300, is directed toward protecting against "clearly unwarranted invasion of personal privacy."

Passing to the second step of the test set forth above, I must determine the comparative demands of individual privacy and the merits of public disclosure. Because information about beneficiaries involves the "disclosural privacy" of third persons, I believe a significant demand of individual privacy is involved. See 37 Op. Att'y Gen. No. 107 at 463 (1978). On the other hand, because the compilation of a mailing list is involved, I do not believe that the merits of public disclosure are substantial. See 38 Op. Att'y Gen. No. 59 at 212 (1979); see also legislative history of § 2-6-109, MCA, *supra*. I note that this analysis appears consistent with the policy of the Social Security Administration: "[S]ince there is usually little or no public interest in disclosing information for disputes between two private parties or for other private or commercial purposes; we generally do not share information for these purposes." 20 C.F.R. § 401.300.

In a similar vein, the financial information sought includes information on every member's retirement benefit. A defined benefit retirement is similar to annuity products one might purchase from a bank, insurance company or other financial institution. The federal Gramm-Leach-Bliley Financial Modernization Act of 1999 specifically indicates Congress' policy that financial institutions must protect customers' nonpublic personal information. See, e.g., 15 U.S.C. § 6801. That is further proof that society considers the MPORS' members' expectation of privacy to be reasonable.

In this case, the MPPA requests information on third parties ("Spouse's Date of Birth") and the form of a member's pension, which would include whether it is a disability pension. As such, the "disclosure privacy of third persons" and the Attorney General's comparison to insurance information is directly applicable. Accordingly, the members do have an objective expectation of privacy that society recognizes as reasonable.

The next step is to determine the merits of public disclosure of this information and whether the privacy concerns outweigh any such merits. The use to which the MPPA seeks to put this information is to verify the actuarial findings of the Board's actuary, Mark Johnson, who is a Fellow of the Society of Actuaries, a Member of the American Academy of Actuaries, and an Enrolled Actuary. Mr. Johnson's work on behalf of the Board was subjected to an actuarial audit by a third-party actuarial firm, Mellon, relative to the PERS in 2004. In its actuarial audit report, Mellon stated that, "[w]e found the work to be reasonable and performed in accordance with generally accepted actuarial principles and practices." Given the complete absence of any concerns over Mr. Johnson's work on behalf of the Board, the merits of public disclosure in this case are virtually nonexistent.

The fact that the Board is constitutionally-empowered to administer the MPORS, specifically including the actuarial aspects of the system, also negates any possible merits of public disclosure in this case. See Montana Constitution Article VIII, Section 15(2); *Baumgardner v. Public Emples. Ret. Bd. of MT*, 2005 MT 199. The significant individual privacy concerns surrounding the release of the information therefore substantially outweigh the minimal merits of public disclosure in this case.

MPPA's argument that the Board "is saying 'trust us,' but then denying the plan member and public any opportunity to independently assess whether that trust is warranted" is completely meritless given the actuarial audit process the Board utilizes. Further, while it may be true that neither Mr. Bullock nor "an actuary in Pennsylvania would determine, or even have reason to try to determine, these identities," if the Board determines this information is open in this manner to the MPPA, the Board opens this information to all, including those who might attempt that determination. The Board should refuse to disclose this information.